

Tobacco Litigation: *Cipollone* and Its Progeny

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SIX MONTHS after the first product liability verdict against a tobacco company, the number of actual cases on file seems to favor the industry. But plaintiffs' attorneys insist there are more on the horizon and they will eventually win the multimillion-dollar David and Goliath battle.

Was the \$400,000 verdict in the *Cipollone* case truly a milestone plaintiffs' victory? Or was it a tobacco win and a signal that suing tobacco companies doesn't pay? (NLJ, June 27.)

The case is currently under appeal in the 3d U.S. Circuit Court of Appeals by the one losing defendant, Liggett Group Inc., and there are signs the plaintiffs' widower, Antonio Cipollone, is tiring of the litigation. *Cipollone v. Liggett Group Inc.*, 83-2864 (D. N.J.).

The defense said the message is

clearly that the suits are too costly and time-consuming for plaintiffs to pursue. But when it comes to actual numbers, plaintiffs' attorneys differ on whether the June 13 verdict is opening litigation "floodgates."

Some lawyers admit it may be the mid-1990s before the verdict is really in and agree with industry statistics of 83 pending suits as of Dec. 14 versus 151 in May 1987. But others, like Paul M. Monzone of San Francisco's Law Offices of Melvin M. Belli Sr., said there are between 1,000 and 1,500 actual or potential cases around the country.

Spokesmen for Philip Morris, which is named in 38 of the pending cases, called the 1,000-to-1,500 figure "preposterous" because there have only been 300 cases total filed in 30 years of tobacco litigation.

Mr. Monzone said he obtained his estimate after conferring with colleagues, but could not specify the filings since the *Cipollone* verdict. "The

tobacco industry may not be completely aware of some [of the cases]," said Mr. Monzone. "We have been deluged by potential cases since *Cipollone*."

But the industry sticks to its records, maintaining that since the verdict, 16 cases were dismissed or dropped and only two new cases were filed.

"It reflects what we said that despite the fact that there was a verdict for the plaintiffs, clearly it was a victory for the tobacco industry," said Robert Northip of Kansas City, Mo.'s Shook, Hardy & Bacon, whose firm represents Philip Morris and Lorillard Inc.

Mr. Northip, whose clients were not found liable for the injury to Ms. Cipollone, said a key to the industry view is that the jury failed to find fraud and misrepresentation as the plaintiffs — who introduced reams of company documents — had alleged. The jury found Ms. Cipollone 80 percent responsible for her actions but said Liggett was partially liable.

"It looks to me as though the events since the case justify our point of view," he said, adding if plaintiffs' predictions were true, "you would have seen a lot more cases."

Richard A. Daynard, chairman of the Boston-based Tobacco Products Liability Project, compared the current litigation to a barbecue with coals simmering. "Eventually it will catch fire."

"Maybe I was naive to think it would have happened sooner," he said. "But we're close," he said, citing *Cipollone* and a 1988 mistrial in a Mississippi case, *Horton v. The American Tobacco Co.*, 9050 (Cir. Ct., Holmes Cty.).

Cynthia Walters, who tried the plaintiffs' case with co-counsel Marc Z. Edell and Alan Darnell, said they never predicted a floodgate and are optimistic more wins will come, partially through use of *Cipollone* documents.

"Cases will continue to be filed in a slow arduous process until we have a record of people winning," said Ms. Walters of Short Hills, N.J.'s Budd Lerner Gross Picillo Rosenbaum Greenberg & Sade P.C.

Perhaps one overlooked point, she indicated, is that the *Cipollone* documents were only those of three defendants and there are not yet any public documents from R.J. Reynolds Tobacco Co. and Brown & Williamson Tobacco Corp.

"We are in discovery against both and have some documents but they are not public due to confidentiality orders," Ms. Walters said. In New Jersey, the industry continues dragging cases out and is "putting off the inevitable" because whether plaintiffs win or lose, those companies' documents become public, she said.

Mr. Daynard, in a recent TPLP newsletter, observed that the current wave of tobacco conglomerate financial activity — the Philip Morris-Kraft Inc. merger and R.J. Nabisco's leveraged buyout — comes during a litigation lull.

R.J. Reynolds is a co-defendant in a pending case with the *Cipollone* defendants, which Ms. Walters said is "in good shape." Shook Hardy's Mr. Northip said it is stayed pending determination of issues in the *Cipollone* appeal. *Haines v. Liggett Group Inc.*, 84-678 (D. N.J.).

Ms. Walters hopes to win the appeal and avoid a retrial. "Mr. Cipollone is not thrilled about the idea of trying the case because he sat through 4½ months of trial," she said. "It was a difficult experience for him. That does not mean he won't do it."

For her work on the case, Ms. Walters and co-counsel shared an award for trial lawyer of the year last summer from the Trial Lawyers for Public Justice, a Washington, D.C., public interest law firm.

In the aftermath of the case's publicity, TLPJ Executive Director Arthur H. Bryant said tobacco cases are going well, with several moving to trial. He added that *Cipollone* documents likely will help elsewhere and the Minnesota Supreme Court could soon rule on preemption. *Forster v. R.J. Reynolds Tobacco Co.*, C1-87-2170.

The industry claim that cases are not worth plaintiffs' efforts, said Mr. Bryant, amounts to "trying to scare lawyers out of taking these cases ... when they know full well there are cases that are slowly coming along that are likely to prove the opposite."

That view was not shared by product liability expert Victor E. Schwartz of Washington, D.C.'s Crowell & Mooring, who sees a gradual end to litigation and a possible reversal in *Cipollone*.

"Courts and jurors are saying 'We're not going to make an award simply because there is a rich defendant,'" he said. "This means five years from now we will look back and see this as just a blip on the product liability horizon."